D. If the FCC nevertheless determines that state commissions should have a role in evaluating whether a wholesale market has developed, the FCC must do so only after an ILEC's systems have been certified by the FCC to comply with its interchangeability policies, and only if:

1. The FCC has adopted rules for state commissions to apply to address whether the *number* of network element providers in a market and other market conditions justify determining that a functioning wholesale network element market exists;

2. The FCC also has made clear that such state determinations must be based on the number of providers in a given region or state, not in a particular locality or end office, or for a particular customer; and

3. *Parties have the right to appeal the findings of a state commission to the FCC before an ILEC is excused from its obligation to provide a particular network element.*

E. The states should have the authority to apply the necessary and impairment standard to add to the list of mandatory UNEs developed by the FCC, as they must to conduct arbitrations and carry out their other responsibilities.

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Donald C. Rowe
Regulatory Counsel

March 4, 1999

BY HAND DELIVERY

Honorable Debra Renner
Acting Secretary
New York Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

Re: Cases 98-C-0690 and 95-C-0657

Dear Secretary Renner:

Please find enclosed an original and 25 copies of the Comments of Bell Atlantic - New York on The Implications of *AT&T Corp. v. Iowa Utilities Board* on Petitions for Rehearing, as requested by the Commission's notice issued February 23, 1999. Copies are being mailed this date to all parties to these proceedings.

Respectfully submitted,

Don C. Rowe (BS)

cc: Hon. Eleanor Stein (By Hand)
Andrew Klein, Esq. (By Hand)
All Service Parties (By U.S. Mail)

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission to Examine Methods by which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements.	:	Case 98-C-0690
Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corporation, WorldCom, Inc. d/b/a LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900.	:	Case 95-C-0657

COMMENTS OF BELL ATLANTIC - NEW YORK ON THE IMPLICATIONS OF *AT&T CORP. V. IOWA UTILITIES BOARD* ON PETITIONS FOR REHEARING

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Dated: March 4, 1999

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PUBLIC SERVICE COMMISSION

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COMMENTS OF BELL ATLANTIC - NEW YORK ON THE IMPLICATIONS OF *AT&T CORP. V. IOWA UTILITIES BOARD* ON PETITIONS FOR REHEARING

New York Telephone Company, d/b/a Bell Atlantic – New York ("BA-NY"), hereby responds to the Notice of Additional Briefing On Rehearing, issued February 23, 1999, in these proceedings ("Notice"). The Notice indicates that the parties petitioning for or opposing rehearing of the Commission's determination in Opinion No. 98-18,[1] concerning methods for network element recombination, may submit memoranda of law on the implications of the United

[1] Opinion No. 98-18, Opinion and Order Concerning Methods for Network Element Recombination, issued November 23, 1998 ("Opinion").

States Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Bd.*,[2] if any, on their pending petitions for rehearing or responses.

As discussed below, there is no reason for the Commission to change the Opinion because it was properly decided and the critical factors underlying that decision have not changed. If anything, the recent Supreme Court decision underscores the merits of continuing to proceed as the Commission has in this case.

I. THE OPINION IS WELL FOUNDED AND SHOULD NOT BE CHANGED

A. The Commission's Opinion Was Properly Decided

In its Pre-filing Statement,[3] BA-NY committed that competitive local exchange carriers ("CLECs") will have reasonable and non-discriminatory access to unbundled network elements ("UNEs") "in a manner that provides competing carriers with the practical and legal ability to combine unbundled elements." (PFS at 10.) Consistent with this commitment, BA-NY provided the Commission with an extensive menu of alternatives for CLEC use in combining UNEs and, in many cases, offered BA-NY-provided combinations as well.[4] Specifically, BA-NY has offered alternatives to traditional physical collocation opportunities, including smaller cages and the sharing of physical collocation sites, virtual collocation, new Assembly Point/Assembly Room alternatives designed expressly for the combination of UNE loops and port facilities, and the "cageless" collocation option available as SCOPE (Secured Collocation Open Physical

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[2] *AT&T Corp. v. Iowa Utilities Bd.*, 1999 U.S. LEXIS 903 (Jan. 25, 1999) ("*Iowa Utilities*").

[3] Case 97-C-0271, Pre-filing Statement of Bell Atlantic – New York, dated April 6, 1998 ("PFS").

[4] BA-NY Methods for CLEC Combination of Unbundled Network Elements, filed May 27, 1998; BA-NY Assembly Room/Assembly Point and Secured Collocation Open Physical Environment service descriptions, filed June 23, 1998.

Environment). BA-NY also made an extensive offer to provide combinations of UNEs in accordance with the PFS.

After a detailed review of BA-NY's proposals and two additional proposals made by CLEC parties, the Commission concluded that – with certain detailed modifications and additions[5] – the methods BA-NY provides for CLECs to combine UNEs are "adequate to support recombination of elements to serve residential and business customers on a mass market basis, in conjunction with the provision by Bell Atlantic – New York of the platform, on the Pre-filing [Statement] terms." (Opinion at 39.)[6] Several CLEC parties took issue with the Commission's determinations in petitions for rehearing.[7] They argued that BA-NY's alternatives would not enable them to serve the "mass market" of customers in New York or were otherwise inherently flawed or discriminatory. They also asserted that the Commission should have ordered the implementation of a "recent change" electronic mode of UNE combinations proposed by AT&T, notwithstanding the fact that AT&T's own witnesses admitted that this method does not exist. They further proposed that the Commission order changes to the terms of the PFS applicable to BA-NY's provision of UNE loop-and-port platforms (the so-called UNE-Platform or UNE-P).

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[5] Among these changes, the Commission required that BA-NY offer a new CLOSE (Collocation with Line-Of-Sight Escort) alternative where a physical collocation alternative cannot be accommodated, and directed that CLECs be permitted to collocate pre-wired frames.

[6] The Commission's conclusion is made contingent on several additional demonstrations to be made by BA-NY and the resolution of certain issues in other proceedings. (Opinion at 39.) One of these issues concerned the terms and conditions applicable to BA-NY's offer to provide Enhanced Extended Link ("EEL") service which has been addressed by the Commission in an independent tariff proceeding. Accordingly, the impact of the Supreme Court's decision on EEL service is not addressed herein. It is sufficient to note that, while the underlying elements comprising EEL are no longer required by law, BA-NY will continue its commitment to provide such service, subject to the terms and conditions set out in the PFS, while the FCC conducts the remand proceeding ordered by the Supreme Court.

[7] Petitions for Rehearing were filed by AT&T, Competitive Telecommunications Association ("CompTel"), MCI WorldCom and RCN.

BA-NY showed in its response[8] that overwhelming record evidence supports the Commission's conclusion that the methods required by the Opinion fully enable CLECs to serve the "mass market" in New York. (Response at 4-15.) The Response also demonstrated that the Commission was correct to reject AT&T's request that its "recent change" concept be ordered implemented, on the grounds that it lacked anything resembling the level of detail necessary for even the assessment of its technical feasibility. (Response at 16-23.) Finally, the Response refuted petitioners' claims concerning the terms and conditions of the PFS applicable to BA-NY's voluntary commitment to provide UNE loop-and-port combinations, showing that these terms were both reasonable and lawful. (Response at 23-35.)[9]

B. The Factors That Underlie The Opinion Remain Unchanged

Subsequent to those filings, the Supreme Court released the *Iowa Utilities* decision. *Iowa Utilities* casts further doubt on the notion that BA-NY has any obligation under the 1996 Act to provide the various UNE combinations it agreed to provide in the PFS. The decision has created substantial uncertainty about the identity of the UNEs that incumbent local exchange carriers ("ILECs") like BA-NY must provide to CLECs pursuant to § 251(c)(3) and, therefore, about the specific "UNE combinations" which they must provide CLECs in a pre-assembled condition. This uncertainty will not be quickly resolved because it will require the Federal Communications Commission ("FCC") to undertake detailed fact-based decisionmaking. Further, it is by no means

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[8] Bell Atlantic - New York's Response to Petitions for Rehearing, filed January 7, 1999 ("Response").

[9] These claims were also procedurally improper, given that the Commission had earlier undertaken to address these claims in a separate tariff proceeding. Nevertheless, they were addressed substantively by BA-NY out of concern that CLECs might otherwise expect favorable resolution of these claims herein. Importantly, the Commission has already properly rejected these same CLEC claims in its Order Suspending Tariff Amendments and Directing Revisions, issued January 11, 1999 ("Order"), in Cases 98-C-0690, *et al.* The Order was, and remains, correctly decided. *See* Section II. E., *infra.*

clear how these issues will be resolved, because the Court has clarified that the legal standards under which UNEs can be established must incorporate factors which will necessarily vary based upon particular technological and market circumstances.

This uncertainty, however, does not require that the Commission revisit or amend the Opinion at this time. The Opinion in this case was based upon two critical factors. First, it was based upon the Commission's review of the alternatives made available to CLECs for their combination of UNEs. Second, it was based upon BA-NY's voluntary commitment to provide CLECs with certain BA-NY-assembled combinations of UNEs, in accordance with the terms set forth in the PFS.

Neither of these factors has been changed in New York as a result of the Supreme Court's decision. BA-NY will: (1) continue to provide the methods for CLEC combination approved by the Commission; and (2) continue to combine UNEs for CLECs pursuant to the terms of the PFS. Thus, both of the critical factors underlying the Commission's determinations in the Opinion – the methods offered for CLECs to combine UNEs, and BA-NY's commitment to combine UNEs for CLECs – remain unchanged by the *Iowa Utilities* decision.

Given BA-NY's commitment to the Commission, and its filed tariffs embodying those commitments, there is no reason for the Commission to change the determination in the Opinion that:

> Bell Atlantic – New York offered five methods to serve this purpose [the combination of UNE loop and port facilities]; AT&T, Covad, and Intermedia also proposed methods. After exhaustive analysis of the strengths and shortcomings of these options, consideration of competitor's proposals, and collaboration, we are requiring the provision of every technically feasible method available today. These methods, with certain modifications, are sufficient to support foreseeable competitive demand in a reasonable and non-discriminatory manner, in conjunction with

[BA-NY's] provision of element combinations pursuant to the Pre-filing [Statement].[10]

BA-NY will comply with the requirements set in the future by the FCC, subject to its right to seek judicial review, regarding the UNEs that must be provided to CLECs. BA-NY will also comply with the FCC's rule regarding the provision of those elements already combined in its network once that determination is made. For now, however, the factors underlying the Commission's determinations in this proceeding remain unchanged and provide the legal and factual basis for this Commission to affirm Opinion No. 98-18. Indeed, one of the reasons the Commission supported the PFS UNE combination commitment was that it removed the uncertainty that surrounds the provision of the UNE-Platform offering under the 1996 Act.[11]

The Commission should affirm the Opinion and deny the petitions for rehearing.[12]

II. CLEC CLAIMS THAT THE OPINION MUST BE CHANGED SHOULD BE REJECTED

Arguments raised in other jurisdictions can be anticipated here and should be rejected.[13]

A. The Supreme Court Opinion Does Not Require BA-NY To Provide UNE Combinations

In *Iowa Utilities,* the Supreme Court reviewed earlier orders of the United States Circuit Court of Appeals for the Eighth Circuit addressing challenges to the FCC's rules implementing the Telecommunications Act of 1996 ("1996 Act").[14] In principal part, the Supreme Court's

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[10] Opinion at 2-3.

[11] Letter of Chairman John F. O'Mara to Deputy Chairman Maureen O. Helmer, dated April 6, 1998, at 2.

[12] The Opinion already indicates that it will be subject to "periodic review" in the future as circumstances may warrant. (Opinion at 35.)

[13] BA-NY reserves the right to reply, however, if the CLEC parties are permitted to do so.

[14] *See Iowa Utilities Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997).

decision reinstated the FCC rule – vacated by the Eighth Circuit – prohibiting ILECs from separating UNEs that are already combined in their network before providing them to competitors (47 C.F.R. § 51.315(b)).[15] The Court did not, however, reverse the Eighth Circuit's invalidation of FCC rules requiring the ILEC to combine elements that are not currently combined in the ILEC's network and to combine UNEs with the CLEC's network elements (47 C.F.R. § 51.315 (c)-(f)). Those rules remain vacated.

Significantly, the Supreme Court also vacated the FCC's rule defining what network elements must be unbundled (47 C.F.R. § 51.319). This rule was vacated because the FCC had earlier ignored the 1996 Act's directive to consider whether access to a facility is "necessary," and whether failure to provide such access would "impair" the ability of the CLEC to provide telecommunications services, *before* determining whether the facility may properly be considered a network element.[16] The issue of which facilities are network elements, and therefore subject to the unbundling requirements of § 251(c)(3), was remanded to the FCC for determination in light of these statutory requirements.

Thus, although the Supreme Court reinstated the FCC's rule prohibiting an ILEC from separating UNEs that are already combined in its network before providing them to CLECs, it is equally clear that the Court left open which facilities are in fact UNEs. Therefore, it did not decide which combinations of UNEs (including the UNE-Platform offering), if any, may be required under the terms of the 1996 Act.

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[15] *Iowa Utilities*, 1999 U.S. LEXIS 903, at *41-45.

[16] *Id.* at *30-40.

Moreover, there are likely to be changes in the future determination of UNEs. In striking down 47 C.F.R. § 51.319, the Court categorically rejected the notion that an ILEC must provide UNEs simply because they have been requested. The Court observed that "... if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) [the necessary and impair standard] in the statute at all."[17] As Justice Breyer explained in his concurring opinion "[g]iven the Act's basic purpose, it requires a convincing explanation of why facilities should be shared (or 'unbundled') where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are available."[18]

The Supreme Court held that, in assessing whether the failure to provide an item as a UNE would impair the CLECs' ability to provide service, the FCC must consider the availability of the element from other sources. It must not assume that any increase in cost or decrease in quality from using another source constitutes an impairment that requires the ILEC to offer the item as a UNE.[19] This means that "elements" that are available from other sources, including elements competitors can (and often do) provide themselves (*e.g.*, loops, operator services, directory assistance, switching and transport), do not have to be provided as unbundled "network elements" under the 1996 Act.

It follows that there can be no requirement for BA-NY to provide combinations of a type or in a locality where there are alternatives to any of the constituent network elements, even if

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[17] *Id.* at *36-37.

[18] *Id.* at *100-01.

[19] *Id.* at *39-40.

those alternatives may be somewhat more costly for CLECs to obtain from another supplier or provide themselves. For example, if customers are within the serving area of a CLEC switch that is capable of providing local dial tone, it is difficult to understand how it would be "necessary" to obtain that element from BA-NY or that the absence of that UNE could significantly "impair" the ability to provide competitive service. In a similar vein, if a CLEC is already providing a direct fiber connection to the premises of a customer or using a cable TV wire, it seems axiomatic that BA-NY's UNE loops are not "necessary" and could not "impair" competitive service delivery. Accordingly, the approach that the FCC must apply in the remand proceeding is profoundly different than the approach it applied in mid-1996. Neither the parties to this case nor the Commission can, or should, anticipate the determinations of UNEs and UNE combinations that will result.

B. The Commission May Not Impose A Combination Obligation

CLECs have claimed elsewhere that state commissions should order ILECs immediately to provide all combinations of UNEs, including the combination of loop and switching elements (the so-called "UNE-Platform" or "UNE-P"). This argument is based on an erroneous interpretation of the Supreme Court's ruling which ignores completely the Court's invalidation of the FCC's rules identifying the UNEs that ILECs are required to provide under § 251(c)(3) of the 1996 Act.

Where components of BA-NY's network are not network elements under the 1996 Act or where requested UNEs are not already combined in BA-NY's network, BA-NY is under no statutory obligation to combine those components or elements for CLECs. In fact, the Court expressly noted that ILEC concerns with the reinstatement of Rule 315(b) could be academic

because the FCC's application of the "necessary" and "impair" standards could limit the elements that ILECs would have to provide.[20]

CLECs arguments that state commissions can and should order ILECs to provide UNE-P and any other combinations that CLECs may desire places the cart before the horse. Until the FCC completes its examination of elements using the statutory standards, any action by the Commission that identifies elements that must be provided – either individually or in combination – would be inappropriate.[21]

C. UNE-P May Not Be Ordered As A Matter Of Law

AT&T has argued elsewhere that its assertion that UNE-P must be provided presents state regulators only with a question of law on which they can issue a mandate. This is clearly incorrect. Whether UNE-P is an existing combination of elements under FCC Rule 315(b) requires the factual determination that each individual component of the platform is, in fact, a network element under the "necessary" and "impair' standards. That is, whether competitive alternatives exist or can be developed for one or more of the platform components, such as local switching, collocated access to switching capacity, loops or transport. If any one component of

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[20] *Id.* at *40-42.

[21] Until the FCC completes its rulemaking on UNEs using the statutory standard as directed by the Supreme Court, this Commission cannot make any lawful determination regarding the elements BA-NY must provide either separately or in combined form. The Supreme Court has clearly held that the FCC – not state commissions – has the authority to implement the 1996 Act's provisions relating to network elements. The matter is now before the FCC pursuant to the Supreme Court's remand. All parties to this proceeding, including the Commission, will be able to participate in the FCC rulemaking in which the network elements ILECs must provide under the 1996 Act will be determined. That proceeding will establish the elements which must be provided in combined form if they are not currently separated in BA-NY's network. BA-NY will of course comply with the requirements set by the FCC, subject to its right to seek judicial review. It would be premature for the Commission to take separate and independent action at this time.

the platform is not an element that BA-NY must provide under the appropriate legal standard, then the requested UNE-P itself need not be provided.

Neither the FCC nor this Commission can short-circuit the factual inquiry necessary to determine the elements that ILECs must provide under the 1996 Act. AT&T's claim that state regulatory authorities should proceed to judgment without any factual record requires nothing less than that these commissions ignore the Court's decision and the due process rights of ILECs like BA-NY. AT&T's request for *a state law mandate* must be rejected.

D. The Recombination Rules Have Been Vacated As Unlawful

CLECs have also argued that the state regulatory authorities should issue an order requiring that BA-NY comply with the requirements of 47 C.F.R. §§ 51.315(c)-(f) and combine elements that have not yet been linked together in BA-NY's network. This position is also wrong as a matter of law. The FCC's rules that CLECs would have the Commission enforce – Rules 315(c)-(f) – were invalidated by the Eighth Circuit and were not reinstated by the Supreme Court. Indeed, none of the parties petitioned the Supreme Court to review the Eighth Circuit's ruling that struck down §§ 51.315(c)-(f). Nothing in the Supreme Court's decision affects the efficacy of the Eighth Circuit determination that the FCC's rules requiring an ILEC to "recombine network elements that are purchased on an unbundled basis, 47 C.F.R. § 51.315(c)-(f), cannot be squared with the terms of subsection 251(c)(3)" of the 1996 Act.[22]

Thus, contrary to this CLEC claim, BA-NY has no obligation to combine elements that are not already combined in its network under either the Supreme Court's or the Eighth Circuit's

[22] *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997).

decisions. Any CLEC effort to resurrect 47 C.F.R. § 51.315(c)-(f), based on a mistaken reading of the Supreme Court's opinion, would be completely unwarranted and unlawful.

E. BA-NY May Place Reasonable Terms On Its Voluntary Offer Of UNE Combinations

CLECs may renew their earlier attack on the terms and conditions of the PFS applicable to BA-NY-assembled UNE loop-and-port platforms. They may argue that the Supreme Court's decision means that the terms of the PFS governing BA-NY's agreement to provide UNE platforms are unlawful. Just as earlier CLEC challenges based on putative concerns for competitive conditions were misplaced (Response at 23-35), so too is any new argument that the Supreme Court's decision has rendered the PFS terms unlawful.

This CLEC argument starts from the fundamentally flawed premise that BA-NY is required to provide CLECs with an assembled platform of UNE loops and ports. However, in the absence of the FCC's review of Rule 319, BA-NY is not obligated under the 1996 Act to provide CLECs with combinations. Inasmuch as BA-NY is not so required by law, it may establish reasonable and non-discriminatory terms for its voluntary UNE-P offer, as it has done in the PFS.[23] Indeed, the Commission has already rejected the same CLEC claims in reviewing BA-NY's "UNE-P" tariff offering:

> We reject arguments that the restrictions on the UNE platform contained in the Pre-filing Statement and the tariff provisions are discriminatory, anti-competitive or in violation of the Act or the Public Service Law. The platform offering, together with the requirement that BA-NY offer a non-discriminatory means for CLECs to obtain combined elements throughout the State, establish

[23] MCI argued earlier that the terms of the PFS are not binding and that BA-NY could revoke its commitments in the future. MCI failed to note that these commitments have been embodied in filed tariffs which BA-NY cannot change without filing specific changes with the Commission.

> a regulatory framework that will enable competitors to compete fairly on a mass market basis.[24]

The Supreme Court's decision does not diminish the Commission's conclusion. For example, the Supreme Court's reinstatement of FCC Rule 315(b) may mean that BA-NY will ultimately be legally required to provide certain UNE combinations where the combination exists today and all of the component network elements are ultimately shown to meet the "necessary" and "impair" criteria. But the establishment of the elements themselves must consider the availability of competitive alternatives, including CLEC self-provisioning. Indeed, the Supreme Court emphasized that the factual application of those statutory criteria means that BA-NY will not, and *should not be required* to provide the combination where alternative sources for those components exist. This was underscored in Justice Breyer's concurring opinion:

> Increased sharing by itself does not automatically mean increased competition. It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would be likely to emerge. Rules that force firms to share *every* resource or element of a business would create, not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms.[25]

This Commission emphasized similar competitive marketplace considerations in supporting the terms and conditions applicable to the UNE-Platform commitment made in the PFS. Thus, rather than being incongruous with the Supreme Court's decision, the UNE-Platform commitment made by BA-NY in the PFS offers CLECs an opportunity for BA-NY-provided combinations well before, but consistent with, the FCC remand proceeding.[26]

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[24] Order at 10.

[25] *See Iowa Utilities, supra*, at *103 (emphasis in original).

[26] There should be no doubt that the Court has anticipated precisely these kinds of limitations on the

(continued . . .)

In any event, there is no legal basis for the Commission to change its earlier determination that the PFS conditions embodied in the tariff are reasonable and lawful. In fact, given the current uncertainty surrounding the availability of UNEs, let alone UNE combinations, the PFS offers certainty that would otherwise be unavailable. The terms and conditions applicable to BA-NY's ongoing provision of assembled UNEs contained in the PFS have been carefully crafted to support the Commission's expert assessment of the market requirements to further promote and sustain the competitive local service market in New York. Petitioners' arguments to the contrary were properly rejected earlier, and should be rejected again.

F. The Supreme Court's Decision Does Not Affect The Commission's Determination Not To Require Implementation Of AT&T's "Recent Change" Proposal

The Supreme Court's decision has absolutely no effect on the Commission's rejection of AT&T's "recent change" proposal. The Opinion did not reject AT&T's proposal because it was barred by law. On the contrary, the Commission specifically refrained from reaching the parties' respective legal arguments. (Opinion at 35.) Instead, the Commission rejected AT&T's proposed "combination" method because it was not available and because, as a mere concept, it patently lacked the requisite level of definition and detail to enable the parties to even consider –

(. . .continued)

availability of UNE-Platform. In considering the arguments against UNE restrictions, the Court observed that "... if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all." *Iowa Utilities, supra*, at *36-37. And in reacting to ILEC concerns that the reinstatement of Rule 315(b) could open the door to unrestricted Platform, the Court notes that "[a]s was the case for the all-elements rule, our remand of Rule 319 [*i.e.*, requiring application of the *necessary and impair* standards] may render the incumbents' concern on this score academic." *Id.* at *42.

far less for the Commission to determine – that it was technically feasible.[27] Obviously, there is nothing in the Supreme Court's decision that provides for the missing record information concerning the AT&T proposal. There is no basis in either law or fact to disturb the Commission's earlier decision to deny that proposal.

It is noteworthy, however, that AT&T's proposal was premised in the FCC's now-vacated rules establishing the local loop and local switching as separate network elements to which an ILEC must provide competitors access. That assumption is now of dubious validity – especially in the case of local switching – given the alternatives available for these elements from sources other than BA-NY and the ability of carriers readily to provide the elements for themselves. For example, AT&T and many other CLECs have abundant switching facilities in place throughout the BA-NY operating area, thus undermining further any legal claim that BA-NY provide them with UNE loop-and-port combinations. Therefore, even if AT&T had produced an adequately detailed proposal that was determined to be technically feasible, which it clearly failed to produce, implementation of the proposal could not be ordered until the FCC first determines that the underlying network elements are UNEs that BA-NY is obliged to provide. Any other Commission action would improperly prejudge the very issue that the Supreme Court has instructed the FCC to address – the identification of network elements that fall within the statutory definition.

III. CONCLUSION

The law applicable to the provision of UNEs and UNE combinations is still in a considerable state of flux, and the ultimate resolution of these issues is uncertain. What is certain,

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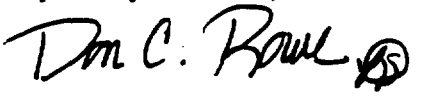
[27] The record provides a more than adequate basis for the Commission to reach that conclusion. (*See* Response at 16-23.)

however, is that the critical factors underlying the Opinion No. 98-18 – BA-NY's continuing commitment to provide CLECs with BA-NY-assembled combinations in accordance with the terms of the PFS, and BA-NY's offer of the menu of methods for the combination of UNEs by CLECs approved by the Commission – remain unchanged. Accordingly, the Commission need not, and should not depart from its earlier conclusion that BA-NY has satisfied its PFS commitments – and has more than satisfied its statutory obligations – with respect to providing CLECs with "the practical and legal ability to combine unbundled elements."

The Commission should affirm its earlier Opinion in this proceeding. The Commission's conclusions set forth in the Opinion were well founded, and its previous rejection of the arguments reiterated in the various CLEC petitions were well considered. For the reasons set forth in the Opinion, in BA-NY's response to CLEC petitions for rehearing and in the foregoing analysis, the Commission should deny those petitions.

Respectfully submitted,



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Dated: March 4, 1999

PROJECT NO. 16251

INVESTIGATION OF SOUTHWESTERN BELL TELEPHONE COMPANY'S ENTRY INTO THE INTERLATA TELECOMMUNICATIONS MARKET	§ § § § §	PUBLIC UTILITY COMMISSION OF TEXAS

PREMIERE NETWORK SERVICE INC.'S COMMENTS REGARDING THE EFFECT OF THE DECISION IN *AT&T V. IOWA UTILITIES BOARD*

The chief question before the Commission in this project is whether you should support Southwestern Bell Telephone Company's ("SWBT") application to provide interLATA service within and originating from Texas. To state the obvious, it is a very important decision. This Commission's opposition to such an application would probably doom it, at least for some significant period of time. Conversely, this Commission's support would significantly improve SWBT's chances for success.

The decision before the Commission is made more important by the fact that once SWBT is authorized to operate in the interLATA market, it will be virtually impossible to revoke that authorization. The Commission should presume that SWBT will have millions of interLATA subscribers within Texas in very short order. Any attempt to deny those subscribers their choice of carrier would encounter enormous resistance. Thus, the decision the Commission makes will affect the service of every Texan that resides within SWBT territory for the foreseeable future.

Because this decision is so important, the Commission needs to be absolutely sure that SWBT will face strong and effective competition on the local level. To do that, the Commission must establish a secure framework for the growth of competition—a framework that will last as long as SWBT's interLATA authorization will last. To borrow a phrase, the competitive framework must be "hog tight, horse high and bull strong."

PROJECT NO. 16251

INVESTIGATION OF	§	
SOUTHWESTERN BELL TELEPHONE	§	PUBLIC UTILITY COMMISSION
COMPANY'S ENTRY INTO THE	§	
INTERLATA TELECOMMUNICATIONS	§	OF TEXAS
MARKET	§	

PREMIERE NETWORK SERVICE INC.'S COMMENTS REGARDING THE EFFECT OF THE DECISION IN *AT&T V. IOWA UTILITIES BOARD*

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Premiere Network Service, Inc. ("Premiere") believes that this Commission can establish a secure and lasting framework for local competition in Texas. It can do so despite the multiple uncertainties now created by the United State Supreme Court's decision in *AT&T Corp v. Iowa Utilities Board*.[1] This Commission can do so by using the powers granted to it under *Texas* law to order unbundling beyond the federal minimum level. As explained in more detail below, the Texas Commission can reaffirm that competitors have "parallel paths" to competition under both federal and state law. The conjunction of those paths will enable this Commission to create a fully competitive environment within Texas.

I. Introduction

Premiere is a competitive local exchange carrier with its headquarters in DeSoto, Texas. Premiere's business plan calls for the provision of innovative telecommunication services to Fortune 500 clients. Premiere intends to be a "Designer Carrier," providing customized and individual services to these clients, based on the *clients'* desires and business objectives. Premiere wants to introduce innovative technologies that will allow advanced use of the existing network. Premiere's experience in the telecommunications industry spans over 12 years. Premiere was the first company in Dallas to run high capacity telephone lines over the local cable television provider. Premiere was also the first company to build a microwave access shot in Texas and the first computer disaster recovery site in America inside a telephone central office. In addition, Premiere has secured the largest local communications network ever installed in Texas for a major manufacturer. In virtually all of these endeavors, Premiere worked successfully with SWBT in constructing state of the art solutions for Fortune 500 companies.

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[1] *AT&T Corp. V. Iowa Utilities Bd.*, 67 U.S.L.W. 4104 (U.S. Jan. 25, 1999 (Nos. 97-826 et al.)) reversing in part, affirming in part and remanding 120 F. 3d 753 (8th Cir. 1997); reversing in part and remanding 124 F.3d 934 (8th Cir. 1997).

The Commission needs to be aware that Premiere has a formal complaint pending against SWBT.[2] Premiere will not address the merits of that complaint in these comments. However, Premiere's experience in that complaint can provide some helpful illumination to some of the questions posed by the Commission.

Premiere's comments in this Project respond to SWBT's *Response to Questions Regarding the Effect of the Supreme Court's Decision in AT&T Corp. v. Iowa Utilities Board*, ("SWBT *Response*"). At the outset, Premiere would note the obvious contradiction in SWBT's *Response*. SWBT claims that the Supreme Court's decision, coupled with the Commission's decisions and the negotiated agreements provides a "solid foundation." (*Response*, p. 2). However, once SWBT reaches the specific questions posed by the Commission, it recognizes that "factual information...is not yet complete" (*Response*, p. 7); "the extent to which CLECs will be required to demonstrate a 'necessity and impaired ability' in order to gain access to UNEs is unsettled" (*Response*, p. 9); "SWBT is unable to state for the record which elements it considers 'proprietary'" (*Response*, p. 10); " the application of the 'necessary and impair' standard may depend on a variety of factors" (*Response*, p. 11) and "it would not be fruitful to guess at what rules ultimately will emerge after remand from the Supreme Court" (*Response*, p. 19). SWBT clearly has a different definition of what constitutes a "solid foundation" than the generally-accepted meaning of that term.

The fact is, the Supreme Court's remand of the Federal Communications Commission's ("FCC's") rules significantly increases the uncertainty in how competition will occur in the future. At this time, it is not clear what individual elements might be available, what process will be necessary to obtain them, whether the elements will vary in availability based on the size or location

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[2] Docket No. 19879, *Complaint of Premiere Network Services, Inc. Against Southwestern Bell Telephone Company, Inc.*

of the competitor, or whether they will can be combined into useful services by carriers that do not own their own facilities. This level of uncertainty makes it more difficult for small competitors like Premiere to write business plans and obtain the necessary capital to expand.

II. Texas Law and the Parallel Path

The uncertainty created by the Supreme Court decision arises out of the fact that the Federal Telecommunications Act of 1996 ("FTA") requires the FCC to consider whether specific network elements are proprietary (FTA, § 251(d)(1)(A)). If they are the question then becomes whether access to those elements is "necessary," and whether the "failure to provide access to such network element would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." (FTA § 251(d)(2)(B)). The Supreme Court decided that the FCC had not given the appropriate consideration to those factors, and remanded them to the FCC for further consideration.

Premiere agrees with the SWBT *Response* when it declares that the results of such remand cannot be predicted. Premiere hopes that the resulting FCC rules will have only minor changes from those that are currently in place. Premiere anticipates, however, that some incumbent LECs will argue that virtually every element has a "proprietary" feature, that access to such elements is "necessary" only when there is *no* alternative for the competitor to using the incumbent's element, and that denial of such elements, even when it does occur, does not "impair" the competitor's ability to provide service. There is a danger that the FCC may adopt one or more of these restrictive interpretations of the law.

It is equally important to recognize that the FCC's determination will not be the final word on the subject of access to network elements. It is safe to predict that one or more parties will be unsatisfied with the result of the FCC's deliberations. They will appeal, and no one will know the

ultimate rules until the Supreme Court rejects the appeals or accepts them and issues another decision. Even in the most optimistic scenario, we are facing another two years of uncertainty on the federal level regarding what elements are available.

This Commission can remove Texas competitors from the risk of restrictive federal rules and two (or more) years of uncertainty. The Texas legislature has declared that it is the policy of this state to "encourage a *fully competitive* telecommunications marketplace."[3] It has declared that incumbent local exchange companies may not "engage in a practice the tends to restrict or impair that competition."[4] This Commission is given the responsibility to "ensure that competition in telecommunications is fair to each participant."[5] Premiere reads these provisions as saying that the Texas legislature wants Texas to be a leader in the level and scope of competition within the telecommunications marketplace.

This reading is borne out by PURA §§ 60.021 and 60.022. Section 60.021 requires an incumbent LEC to, *at a minimum* "unbundle its network to the extent the Federal Communications Commission orders." Section 60.022 authorizes the Texas Commission to go *beyond* the federal minimum and adopt orders requiring unbundling. The Commission is directed to consider "the public interest and competitive merits of further unbundling."[6]

This Commission has already recognized that the state law provides competitive options that supplement the federal law. Right after the FTA was adopted, the Commission was confronted with contentions that the resale provisions of PURA (which limited the resale discount to 5%) were

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[3] Public Utility Regulatory Act, ("PURA"), §51.001(b)(2).(emphasis added).

[4] PURA, §55.006(2).

[5] PURA, §60.001.

[6] PURA, §60.022(b).

preempted by federal law. As explained in the May 15, 1996, Comments of the Public Utility Commission of Texas to the Federal Communications Commission in CC Docket No. 96-9, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*,[7] the Commission resolved the apparent discrepancy by determining that the state statute offered a "parallel path" to the federal enactment, and that a competitor may elect from either at its option.

In order to ensure that CLECs have a solid foundation from which to compete in Texas, Premiere requests that this Commission commence a rulemaking pursuant to Section 60.022 and codify for Texas all of the unbundled network elements ("UNEs") that are currently contained within any interconnection agreement[8], and also provide that any carrier may obtain service under those UNEs without showing that such access is "necessary" or that lack of such access would "impair" its ability to provide service. As a part of that rulemaking, Premiere also requests that the Commission declare that these UNEs are the minimum that are available under Texas law, and that each interconnection agreement must contain these elements in order to receive Commission approval.

Federal law clearly contemplates that a state may adopt provisions which provide for a greater amount of competitive access to UNEs. Section 252(e)(3) of the FTA states that "...nothing in this section shall prohibit a State commission from establishing or enforcing other requirements

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[7] *See also* Docket No. 14658, *Application of Southwestern Bell Telephone Company for Approval of the Local Access Service Tariff Including Resale Services Pursuant to PURA 1995 § 3.2532*, ____ PUC BULL _____ (April 10, 1996).

[8] Since this action would be pursuant to Texas law, the Commission may also want to examine whether it should order the unbundling of every "Basic Network Function" identified in Substantive Rule 23.91(c).

of State law in its review of an agreement..." Since the proposed further unbundling rules would be pursuant to Commission rule, they would be included within "other requirements of state law."

Adoption of this proposed rule would give the Commission the assurance that it needs in order to support SWBT's entry into the interLATA market. It would also allow small Texas competitors like Premiere to build a stable business plan that would be attractive to investors. Equally important, it would allow Premiere's Texas clients the assurance that they could order from Premiere and know that the services they request will be provided.

Once the proposed rules are adopted, the questions posed by the Commission regarding unbundling and other impacts of the Supreme Court's decision will have less significance. The answers to those questions, however, provide further support for Premiere's requested rulemaking. Therefore, Premiere will address the pertinent questions below.

III. Commission- Posed Questions

A. Pricing

The Commission asked SWBT several questions regarding the impact of the Supreme Court decision on the pricing that is contained within its arbitrated agreements. Premiere understands the SWBT *Response* to say that SWBT does not agree with the prices set by this Commission, but that they apparently comport with the FCC rules.

Now that the FCC pricing rules are the law of the land, and SWBT agrees that the Commission's orders complied with those rules, SWBT should be willing to withdraw those appeals that contest the level of prices ordered by the Commission. Maintaining those appeals seems to Premiere to be inconsistent with SWBT's claim that there is a "solid foundation" for competition.

B. Access to UNEs

The Commission has asked what SWBT's plans are with regard to the provisioning of UNEs. SWBT's *Response* says that the provisions of current agreements will apply "until alternative provisions are approved for inclusion in the agreement through the regulatory and judicial processes."(*Response*, p. 9).

The Commission should request additional information from SWBT regarding how it interprets the provisions of its current agreements. Premiere's interconnection agreement (Section 3.1), for example, provides that if a law or regulation that was the basis of a provision of the agreement is "invalidated, modified or stayed" by "legislative body, court or regulatory agency," the corresponding provision in the agreement is also invalidated, modified or stayed. If the FCC changes its unbundling rules, would SWBT say that such a modification is automatically incorporated into the current agreement as a result of this section? Would SWBT argue that such modifications are "mutually agree[d]" to by the parties? (*Response*, p. 9)?

SWBT also declines to submit a definition of the terms "necessary," "impair" and "proprietary" (*Response*, p. 10). In light of the fact that these have become key terms in the Act, the Commission should not support SWBT's application for interLATA authority until these provisions *can* be defined. As an alternative, of course, this Commission can provide that competitive carriers do not have to demonstrate "necessity" or "impairment" in order to obtain UNEs in Texas.

SWBT offers to create new UNEs "pursuant to the special request" process (*Response*, p. 11). The Commission should be aware that the special request process in SWBT agreements involves over 150 days of requests, responses, studies and negotiations. SWBT interprets those provisions to apply to even those services where SWBT is currently providing a package of services

to its retail customer.[9] The Commission should consider how long a potential customer will wait for a new provider to provide the same service that it is currently receiving from SWBT. Premiere does not believe that any Fortune 500 customer will wait 150+ days for a service to be converted. Therefore, the Commission should not assume that competition will be enhanced because SWBT has a "special request" process for UNEs.

SWBT does say that the definition of "necessity" and "impair" may depend on a variety of factors, including "the geographic location of the UNE, the characteristics of the customer the CLEC intends to serve with the UNE, the duration of the requested use of the UNE, and the availability of alternatives from SWBT and/or other providers."(*Response*, p. 11). Premiere reads this list as suggesting that the "necessary and impair" standard may be applied on a case-by-case basis.

The Commission should recognize that a case-by-case determination will effectively end a competitors' ability to build a business plan that utilized UNEs. Using this list, is it possible for Premiere to obtain a UNE in DeSoto that it might not be able to obtain in Richardson? Is it possible that Premiere will be denied a UNE when it is serving a Fortune 500 customer, but be able to obtain the same UNE in the same area for a mom-and-pop store? Could the UNE's duration be influenced by the amount of revenue Premiere earns from year to year? Could a UNE be terminated because Premiere merged with another carrier with more resources? Can the UNE be terminated if SWBT offers what it considers to be equivalent service under a tariff?

Other questions arise about the procedure that would apply to a case-by-case determination. How would a CLEC order a UNE? Would CLECs be required to submit some sort of form that described the geography, customer, duration and a list of alternatives? Who would make the initial

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[9] In Docket No. 19879, Premiere is contending that if a service is "operational at the time the request" for a UNE, SWBT is required to provide a price within ten days of the request.

decision that a CLEC did not qualify for the UNE it requested? What would be the process if a UNE were rejected? Would a CLEC need to come to the Commission each time it was refused a UNE? How long would the entire process take? How many customers would be willing to wait while the CLEC tried to obtain a service?

SWBT has already demonstrated a consistent ability to place roadblocks in the provision of service to Premiere. One favorite SWBT roadblock is to use the legal and regulatory process to force CLECS into a never-ending quagmire. SWBT can use hyper-technical readings of the contract to divert competitor's efforts from the marketplace to the hearing room. SWBT can raise objection after objection to the provision of a service. The only response that a CLEC has is to complain to this Commission. SWBT is then like Br'er Rabbit, tossed into the comfort of his familiar briar patch. SWBT can use the ordinary course of due process to delay, deny and divert CLECs. SWBT can drain the resources of small CLECs like Premiere. It does not matter if SWBT ultimately loses on the substantive issues. The delay of service and the diversion of CLEC resources is an automatic victory for SWBT. This Commission should resist any change that would give SWBT greater ability to delay the provision of service.

If the Commission were to adopt the Texas rule advocated by Premiere, SWBT's ability to delay service due to new rules for UNEs would not be enhanced. Since it is the policy of Texas to encourage telephone competition, the Commission should adopt such a rule and avoid the dangers inherent in a case-by-case determination of UNE availability.

C. Bundling of UNEs

SWBT has stated that it "is abiding by the terms of those contracts in Texas which at the present time have been deemed to require SWBT to combine UNEs..." (*Response*, p. 14) Premiere's

complaint involves, in part, such a provision. As the Commission can anticipate, the parties have differing opinions as to whether SWBT is "abiding" by its contract.

Without going into the details of Premiere's dispute, the Commission can know that it involves Premiere's ability to provide service to Fortune 500 customers. It typically takes several months before a telecom manager of such a firm will be persuaded to try Premiere's services. Premiere's clients are intensive users of telecommunications. They have built up a complex legacy network over the years that works for their particular applications. They cannot afford to lose any function for an appreciable time, and a complete loss of telephone service could be devastating. As cautious managers, they want to test Premiere's ability to deliver service on a limited basis, before giving over the entire network. From the client's perspective, it is absolutely essential that the transfer of service from SWBT to Premiere be seamless.

Premiere needs access to UNEs in order to provide the innovative services that its clients want. However, before those innovations can be accomplished, the service must be transferred from SWBT to Premiere without the loss of any function or feature. For Fortune 500 customers, every "bell and whistle" of a complex legacy network must be transferred intact. Premiere believes that this commercial fact of life meets a rational definition of the "necessary and impair" statute. Transfer of such service is "necessary" because the customer will not leave their current provider without such a seamless transfer. The lack of the ability to make such transfers would completely "impair the ability of [Premiere] seeking access to provide the services that it seeks to offer." (FTA § 251(d)(2)(B)).

Premiere is also concerned with SWBT's interpretation of the FCC's rule that the ILEC "shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315. SWBT asserts a "general right to control its own network" (*Response*, p. 14).

Premiere is concerned that SWBT may claim its "general right" will allow it to separate UNEs when necessary for the provision of service. In Docket No. 19879, SWBT is resisting the sharing of facilities that serve a Premiere customer. The Commission should request more details about what SWBT believes is its "general right," and specifically how that right might interfere with its obligation under the FCC rules.

This Commission should require a commitment from SWBT that it will provide all the UNEs necessary to make a seamless transfer of every bell and whistle, and will do so in a manner that does not involve any material disruption of service to the end-user. If SWBT resists making such a commitment, the Commission should take such resistance into account when making the decision regarding SWBT's entry into the interLATA market.

D. MFN/Pick and Choose

SWBT says that a CLEC that opts into an interconnection agreement must take the rates, terms and conditions of the arrangement "along with any definitive interpretations of those provisions." (*Response*, p. 16). Premiere agrees that the rates, terms and conditions of one agreement go to the next. It urges caution, however, with regard to the concept of also adopting "definitive interpretations" of those provisions.

In the course of its dealing with SWBT, Premiere has encountered several instances where the SWBT representative claimed that a contract provision did not mean what it appeared to mean. (Premiere has MFN'd into the AT&T agreement). Since Premiere is unable to monitor the many proceedings and negotiations that involve the AT&T agreement, it is at a major disadvantage when disputing SWBT's contentions. It would not be good public policy for this Commission to require every small carrier that MFN's into AT&T's agreement to monitor and understand the negotiations associated with other Parties' agreements, because such an approach would involve enormous investment without a matching return in value. Instead, parties to an agreement should be allowed

to focus and rely on the plain and ordinary meaning of the terms contained in their agreement. In Docket No. 19879, Premiere has advocated that the Arbitrators interpret its agreement with SWBT based on the plain, ordinary and generally accepted meaning of the words, based on the "four corners" of the document.

Premiere does not believe the Commission needs to determine at this time the impact of purported "definitive interpretations" in order to determine whether SWBT should be allowed to participate in the interLATA marketplace. Premiere asks that the Commission reserve this determination until such time as it may come before you.

III. Conclusion

Premiere urges this Commission to provide all competitors in Texas with a stable framework for competition. The Commission can do so by crafting Texas rules for unbundling under the "parallel path" theory. The adoption of such rules will facilitate the creation of a competitive local exchange market that will have the same duration as SWBT's entry into the competitive long-distance market. Once the rules for competition in Texas are so strongly established, the Commission will be able to support SWBT's entry into the interLATA marketplace.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all parties in this Project on the 22nd day of February, 1999.

Leo A. Wrobel

March 5, 1999

Mark W. Musser, Secretary
New Jersey Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

RE: TSFT/UNE – Docket Nos. TX98010010, TX95120631, TO96070519, TO98010035, and TO98060343

Dear Secretary Musser:

The decision in *Iowa Utilities* has markedly changed the legal landscape regarding Unbundled Network Elements (UNEs). Contrary to the comments of many of the parties, it is clear that under the Supreme Court's decision, the FCC must develop and apply a limiting standard in determining what UNEs must be made available. As the Court observed, "[I]f Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included §251(d)(2) in the statute at all."[1] The new standard must be consistent with the Court's decision, the language of Section252(d)(2), and current marketplace facts. It is equally clear that until the FCC has completed its remand proceeding, this Board has no jurisdiction to determine what UNEs or combinations BA-NJ must provide. Nevertheless, as part of the TSFT process, BA-NJ has voluntarily agreed to provide certain combinations. The Board should conclude the TSFT process on schedule, which will speed the implementation of the local competition provisions of the Act.

I. THE SUPREME COURT'S DECISION HAS SUBSTANTIALLY CHANGED THE LEGAL FRAMEWORK GOVERNING ACCESS TO UNEs.

Contrary to the view of some parties, the Supreme Court's decision vacating the FCC's rule dictating which network elements must be unbundled (Rule 319) has significant, "practical impact[s]" on the UNEs that BA-NJ must make available to competitors.[2] As the Supreme Court said, Rule 319 violated the "clear limits" of the

[1] *AT&T Corp. V. Iowa Utils. Bd.*, __ U.S. __, 67 USLW 4104, 1999 LEXIS 903 (1999) at *36-37.

[2] See Comments of the Competitive Telecommunications Association and America's Carriers Telecommunications Associations CompTel/ACTA at 2 ("The Supreme Court's decision has no practical impact on the network elements that BA-NJ must make available to competitors in New Jersey.").

Act, and, therefore, its invalidation of that Rule will have far reaching consequences which will extend to what combinations of elements BA-NJ must provide.[3] Thus, although the Supreme Court reinstated Rule 315(b) -- which prohibits ILECs from separating unbundled network elements (UNEs) that are already combined in the network – it explained that "a remand of 319 may render the incumbents' concern on this score academic."[4]

In striking down Rule 319 and the FCC's underlying standard, the Court categorically rejected the FCC's notion of when an incumbent LEC such as BA-NJ must provide UNEs to CLECs under the Act's "necessary" and "impair" requirements. The Court stated that the definition of a UNE "cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network."[5] The Court also observed that the "assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms."[6] This means that "elements" that are available from other sources, including elements that competitors can (and often do) provide themselves (e.g., loops, operator services, directory assistance, switching, and interoffice facilities), do not have to be provided as unbundled network elements under the 1996 Act. Thus, it seems very likely that the list of UNEs will shrink after the FCC's remand proceeding.

A. The Board Lacks Authority to Determine What UNEs Must Be Provided Under the Act.

Contrary to the views of several parties,[7] the Board does not have state authority, independent from a delegation from the FCC, to determine what is an UNE under the Act.[8] In *Iowa Utilities Board*, the Supreme Court held that the Act vests authority solely in the FCC to determine matters that fall within the broad scope of the Act's reach. The Supreme Court squarely reversed the Eighth Circuit's holding that the 1996 Act did not grant general jurisdiction to the FCC to issue regulations implementing the Act.[9] Rejecting arguments that the rulemaking authority granted to

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[3] *Iowa Utils. Bd.*, 1999 U.S. LEXIS 903, at *47.

[4] Id. at *42.

[5] Id. at *5.

[6] Id. at *6.

[7] See MCI WorldCom Comments at 4; RPA Comments at 6.

[8] 47 U.S.C. § 251(d)(2) empowers *the FCC*, not the states, to determine when access to a UNE must be made available.

[9] *Iowa Utils. Bd.*, 1999 U.S. LEXIS 903, at *19 n.6 ("[T]he question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is

the FCC under § 201(b) of the Act is limited to interstate matters, the Court stated: "We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996."[10]

The notion that the Board has independent state authority to require the provision of individual UNEs simply does not survive the Supreme Court's decision in *Iowa Utilities Board.* The Board, therefore, has no ability under state law to determine BA-NJ's responsibilities with respect to matters falling within the scope of § 251(c)(3) of the Act.

It is clear that the FCC must establish standards for "necessary" and "impair" and that the state's authority to define new network elements must adhere to the FCC's standard for the "necessary" and "impair" limitation.[11] In the absence of a valid FCC standard for interpreting Section 251(d)(2), the Board is not free to supply its own interpretation. Even if the Board is eventually delegated some authority with respect to implementing the "necessary" and "impair" standards, the Board's decisions must as a practical matter await FCC determinations on what facilities must be unbundled. In the meantime, the Board may not impose requirements that conflict with federal law and regulation.[12]

The opposing parties also contend that BA-NJ must continue to provide the seven UNEs identified by the FCC in its now vacated rule 319 because (1) section 271 of the Act contains virtually the same list;[13] (2) the interconnection agreements obligate BA-NJ to continue providing these UNEs;[14] or (3) Bell Atlantic's commitment to the

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whether the state commissions' participation in the new *federal* regime is to be guided by federal-agency regulations. If there is any presumption applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange. . . .This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.")(emphasis in original).

[10] *Iowa Utils. Bd.*, 1999 U.S. LEXIS 903, at *19.

[11] *See Local Competition Order* at ¶281 ("If providing access to an unbundled element is technically feasible, a state must then consider the standards set forth in section 251(d)(2), as we interpret them below."). *See also* ¶ 277 ("[S]tates must follow our interpretation of these standards to the extent they impose additional unbundling requirements during arbitrations or subsequent rulemakings.").

[12] While § 251(d)(3) preserves state authority to establish "access and interconnection obligations," a state may do so only to the extent a state requirement is "consistent with the requirements of [Section 251] and "does not substantially prevent implementation of this section; and the purposes of this part." § 251(d)(3)(C). Several parties claim that the Board can define the required UNEs under Bell Atlantic's Plan for Alternative Regulation. See, e.g., MCI WorldCom Comments at 5. They are wrong. Although the Board clearly can determine what the "reasonable increments" are that allow uninhibited access to BA-NJ's network, the Board must do so consistent with federal law.

[13] See e.g., AT&T Comments at 10; MCI WorldCom Comments at 4 n.8; Comptel/ACTA Comments at 5-6.

[14] See e.g., AT&T Comments at 10; MCI WorldCom Comments at 5-6.

FCC that it will continue to provide the seven UNEs individually during the remand proceeding somehow commits BA-NJ to provide these elements indefinitely.[15] These claims are wrong.

First, several parties[16] contend that under the section 271 checklist, BA-NJ is required to provide five of the seven original UNEs.[17] Therefore, according to this argument, Congress intended for at least those five elements to be unbundled network elements. This interpretation of the Act is nonsensical. The unbundled access requirements under 251(c)(3) and 252(d)(1) are clearly distinct from the checklist requirements contained in section 271(c)(2)(B)(iv-vii, x). The Act, in checklist item (ii), requires a Bell Operating Company to provide nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) before it can provide long distance service. Thus, under checklist item (ii), before the FCC grants BA-NJ long distance relief, BA-NJ must provide the UNEs set out by the FCC. The Act then lists additional checklist items that BA-NJ must also provide. Although several of those additional checklist items are similar to the UNEs contained in the FCC's now vacated Rule 319, the Act does not say that those additional checklist items are UNEs. In fact, if they were UNEs, there would be no reason to list them separately and these provisions would be entirely duplicative of checklist item (ii).

Thus, the Act requires all ILECs to provide UNEs in accordance with sections 251(c)(3) and 252(d)(1), and Bell Operating Companies to provide the additional checklist items prior to obtaining long distance relief. This distinction is significant. For example, although BA-NJ must provide local switching unbundled from transport, local loop transmission, or other services (checklist item vi), there is no requirement in section 271 of the Act that BA-NJ provide that item ubiquitously, at TELRIC prices, or as part of combinations. Contrary to the suggestions of AT&T and MCI WorldCom, BA-NJ's position is entirely consistent with the 271 requirements.

Next, AT&T and MCI WorldCom contend that the interconnection agreements require BA-NJ to provide all seven UNEs.[18] They are wrong again. Although the

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[15] Comptel/ACTA Comments at 7-8.

[16] See e.g., AT&T Comments at 10; MCI WorldCom Comments at 4 n.8; Comptel/ACTA Comments at 5-6.

[17] These checklist items are local loop transmission from the central office to the customer's premises, unbundled from local switching or other services (checklist item iv); local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services (checklist item v); local switching unbundled from transport, local loop transmission, or other services (checklist item vi); nondiscriminatory access to 911 and E911 services, directory assistance services to allow the other carrier's customers to obtain telephone numbers, and operator call completion services (checklist item vii); and nondiscriminatory access to databases and associated signaling necessary for call routing and completion (checklist item x).

[18] See e.g., MCI WorldCom Comments at 5-6; AT&T Comments at 10.

interconnection agreements obligate BA-NJ to provide the seven UNEs listed in the FCC's now vacated Rule 319, that obligation is subject to a standard change of law provision contained in those agreements.[19] Now that the Supreme Court has vacated the FCC's list of required UNEs, and until the FCC enumerates a more limited list of UNEs under the appropriate "necessary" and "impair" standards, BA-NJ is no longer obligated to provide the UNEs listed in the agreements.

Finally, CompTel/ACTA maintains that the Supreme Court decision has no practical impact on the network elements that BA-NJ must make available to competitors in New Jersey because BA-NJ has told the FCC it will continue to make available each of the network elements set forth in the FCC's original list during the course of the remand proceeding.[20] It is true that by letter dated February 8, 1999, Bell Atlantic advised the FCC that during the FCC proceeding on remand from the Supreme Court, it will continue to make available each of the individual network elements defined in the now-vacated FCC rules and in Bell Atlantic's existing interconnection agreements. Bell Atlantic did not, however, agree to provide combined network elements. Bell Atlantic's letter to the FCC is simply an accommodation designed to ensure that negotiation of appropriate interconnection agreements, consistent with the terms of the Act, can proceed. It is also a voluntary commitment to avoid disruption to the competitive *status quo* pending the FCC's action. But this is not an admission that those elements are, or should be, the elements that the FCC ultimately determines are required under § 251(c)(3).[21]

B. The Board Cannot Compel BA-NJ to Provide Combinations of UNEs.

As previously explained, the FCC has not yet defined which of BA-NJ's facilities are properly considered "network elements" which must be made available on an unbundled basis and what role, if any, state commissions such as the Board should play in that process. Until there is a decision about which BA-NJ facilities must be made available on an unbundled basis in accordance with the 1996 Act's "necessary" and "impair" standards, there can be no determination of whether BA-NJ has any

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[19] For example, both agreements provide, "BA shall provide unbundled Network Elements in accordance with this Agreement and Applicable Law." In addition, AT&T implies that Bell Atlantic waived any right to claim that elements do not satisfy the "necessary" and "impair" standards based on comments made to the FCC approximately three years ago. AT&T Comments at 5 n. 2. Clearly, given the passage of time, Bell Atlantic is free to make a factual showing today that elements do not satisfy the standard set out in the Supreme Court's decision.

[20] Comptel/ACTA Comments at 7-8.

[21] AT&T and MCI WorldCom also hint that because BA-NJ does not concede that it will be required to provide all seven of the original UNEs, the Board's TSFT may not be able to meet its deadline. AT&T Comments at 10; MCI WorldCom Comments at 2. As is further described in Section III below, there is no reason to delay the TSFT process.

obligation to provide pre-existing combinations of elements.[22] In sum, those parties who argue that the Board can now order combinations put the cart before the horse.

1. The UNE-Platform.

Some parties continue to state that BA-NJ has an obligation to provide the UNE-Platform for all residential and business customers without any restrictions.[23] They are wrong. The Supreme Court did not identify the facilities that must be provided as network elements and did not endorse the UNE-Platform. Rather, the Court left it up to the FCC to identify the elements and made it clear that in doing so the FCC must apply the "necessary" and "impair" standards of the 1996 Act. There is no doubt that the Court anticipated limitations on the availability of UNE-Platform. In reacting to ILEC concerns that the reinstatement of Rule 315(b) could open the door to unrestricted Platform, the Court notes that "[a]s was the case for the all-elements rule, our remand of Rule 319 [*i.e.*, requiring application of the *necessary* and *impair* standards] may render the incumbents' concern on this score academic."[24]

Under the Supreme Court's decision, the UNE-Platform will not be required if the FCC determines that one or more elements that are currently part of the platform is not "necessary" or its absence would not "impair" the ability of CLECs to compete. For example, the UNE-Platform will not be required where competitive alternatives for one or more network elements (e.g., collocated access to switching capacity, loops, or transport) exist. Nevertheless, BA-NJ continues to be willing to voluntarily offer UNE-P in specified circumstances under state-specific terms and conditions in conjunction with 271 relief.

2. EELs

In addition, the Board cannot require BA-NJ to provide EELs at this time. EELs are combinations of UNEs that are not currently combined in BA-NJ's network. MCI WorldCom and CompTel/ACTA contend that the Supreme Court's decision supports their view that BA-NJ is required to provide EELs.[25] They misread the opinion and mischaracterize BA-NJ's network. As BA-NJ explained in its Initial Comments, BA-NJ is not required to combine these UNEs for the CLECs and any rule purporting to impose such a requirement would be inconsistent with the Act and the surviving portion of the Eighth Circuit's ruling.

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[22] AT&T claims that BA-NJ should not be permitted to charge a glue fee. AT&T Comments at 6. AT&T's argument is unavailing. Absent a substantive requirement that UNEs be combined, which does not exist, no purpose is served in addressing what the glue fees associated with such combinations might be.

[23] See e.g., AT&T Comments at 6.

[24] *Iowa Utils. Bd.*, 1999 U.S. LEXIS 903, at *25.

[25] MCI WorldCom Comments at 8.

MCI WorldCom and CompTel/ACTA claim that Foreign Exchange (FX) service that BA-NJ provides is identical to EELs and, therefore, EELs are already combined in BA-NJ's network.[26] They are wrong. First, BA-NJ's FX service is not the same as an EEL. BA-NJ's FX service is a combination of three elements: loop, transport and switching at the remote central office. The type of EEL that most CLECs have been asking for, in contrast, consists of a combination of DS0 loop and DS1 or DS3 transport and multiplexing. If BA-NJ is required to provide EELs where it currently provides FX service, BA-NJ would have to disconnect the switching.[27] Clearly, EELs do not currently exist in BA-NJ's network.

Second, MCI WorldCom and CompTel/ACTA incorrectly assume that if something that looks like an EEL exists anywhere in BA-NJ's network, BA-NJ must provide EELs everywhere. This is an incorrect reading of BA-NJ's obligations. Under 315(b), BA-NJ cannot separate network elements that BA-NJ "currently combines." That rule does not obligate BA-NJ to combine elements for a particular end-user if those elements are not already combined for that customer. This distinction is significant since a relatively small number of customers actually have FX service which would be eligible to convert to an EEL.

Third, a number of parties cite to Mr. Albert's testimony in Massachusetts in support of their claim that FX service and EELs are identical. These parties mischaracterize his testimony and BA-NJ's network. BA-NJ's FX service consists of a loop, transport and switching. The CLECs requested EELs with GR-303 concentration, and Mr. Albert explained that under the Massachusetts EEL proposal, CLECs would receive "service exactly as we do today for our own end users" – without concentration.

III. THE TSFT PROCESS SHOULD CONTINUE CONSISTENT WITH THE SUPREME COURT DECISION

A. BA-NJ Has Made An Offer to Provide Limited UNE-Platform and EELs.

Despite the Supreme Court decision, BA-NJ will make the UNE-Platform and EELs available pursuant to the November 16, 1998 Prefiling Statement and the

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[26] Comptel/ACTA Comments at 10-11; MCI WorldCom Comments at 7-8. These parties also claim that BA-NJ currently provides EELs in the form of special access. Comptel/ACTA Comments at 11; MCI WorldCom Comments at 7-8. This argument also mischaracterizes BA-NJ's network. Special access circuits typically would terminate a high capacity trunk at a central office, from where a dedicated facility would run to the IXC POP or switch. In addition, converting existing special access circuits into EELs runs afoul of the FCC's restriction on UNEs as direct substitutes for access facilities.

[27] Moreover, CLECs are requesting EELs that terminate at their own switch or at a collocation cage at certain specific hub central offices. Only in rare circumstances will the hub happen to be the same central office from where the BA-NJ customers currently get their FX dial tone.

December 28, 1998 Response to Proposal of AT&T.[28] Limitations like those contained in the BA-NJ proposal are foreshadowed in the Supreme Court's decision. Indeed, the Supreme Court emphasized that the factual application of those statutory criteria means that BA-NJ *should not be required* to provide the combination where alternative sources for those components exist. This was underscored in Justice Breyer's concurring opinion:

> Increased sharing by itself does not automatically mean increased competition. It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would be likely to emerge. Rules that force firms to share *every* resource or element of a business would create, not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms.[29]

Several parties claim that in order for the TSFT to open competition in New Jersey, all combinations must be provided in New Jersey. They are wrong. As explained in Section I, as a result of the Supreme Court decision there are almost certain to be restrictions on UNEs and combinations.

Specifically, elements that are available from other sources do not have to be unbundled "network elements." It follows from the Court's opinion that there can be no requirement for BA-NJ to provide combinations of a type or in a locality where there are alternatives to any of the constituent network elements, even if those alternatives may be somewhat more costly for the CLEC to obtain from another supplier or by providing them for itself. For example, if customers are in range of a CLEC switch that is capable of providing local dial tone, it is difficult to understand how it would be "necessary" to obtain that element from BA-NJ or that the absence of that UNE could significantly "impair" the ability of a CLEC to provide competitive service. In a similar vein, if a CLEC is already providing a direct fiber connection to the premises of a customer or using a cable TV wire, it seems axiomatic that BA-NJ's UNE loops are not "necessary" and could not "impair" competitive service delivery.

B. The Board Should Adopt a Result in the TSFT That Will Reflect Local Competitive Conditions and Will Be Consistent with the Remand Proceeding.

The Board can take steps in addition to adopting BA-NJ's voluntary UNE-Platform and EEL proposal in anticipation of the FCC's establishment of which UNEs

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[28] There should be no doubt that the Court has anticipated precisely these kinds of limitations on the availability of UNE-Platform. In considering the arguments against UNE restrictions, the Court observed that "... if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included §251(d)(2) in the statute at all." *Iowa Utils. Board.*, 1999 LEXIS 903, at *36-37.

[29] *Iowa Utils. Board.*, 1999 LEXIS 903, at *102-03 (emphasis in original).

ILECs must provide. The Board should immediately require CLECs to identify where competitive alternatives exist to the now invalidated UNEs. Examples of "elements" that are available from other sources include loops, operator services, directory assistance, switching and interoffice facilities. Attached as Exhibit 1 are proposed interrogatories to the CLECs which would provide a start in obtaining such information.

In the meantime, the FCC will conduct its remand proceeding, which Sprint has stated may conclude by July.[30] BA-NJ will continue to provide on an individual basis the UNEs on the FCC's original list. These UNEs most likely exceed those that the FCC will conclude satisfy the "necessary and impair" test.[31] If the FCC ultimately requires BA-NJ to provide more UNEs (including the UNE-Platform and EELs) than BA-NJ is providing, BA-NJ will comply with the FCC requirements, subject to its right to seek judicial review. If BA-NJ's voluntary commitment, as part of the TSFT process, goes beyond that required by the FCC remand proceeding, BA-NJ will continue its voluntary provision of network components that are not UNEs and the corresponding combinations for at least two years. BA-NJ will also provide a reasonable transition mechanism at the end of the two-year period.

[30] Sprint Comments at 4.

[31] In addition, they meet or exceed the "reasonable increments" standard established in the Plan of Alternative Regulation.

Conclusion

The law applicable to the provision of UNEs and UNE combinations is still in a considerable state of flux, and the ultimate resolution of these issues is uncertain. What is certain, however, is that, since BA-NJ cannot now be compelled to provide the UNE-Platform or EELs, the Supreme Court's ruling enhances the value of a settlement or a reasonable Board determination on limited Platform and EEL availability to which BA-NJ will agree. The TSFT process should be completed on schedule consistent with the recommendations contained in these Reply Comments.

Very truly yours,

BSA:dmp
cc: Service List

NJBPU INFORMATION REQUESTS

1. How many New Jersey ILEC services are you purchasing for resale to your customers? If exact figures are not known, provide estimates.
   A. By type of service (voice grade lines, DS1, DS3, Centrex lines, PBX trunks, etc.);
   B. By county, municipality or ZipCode;
   C. Business vs. Residence.
   D. What portion of the voice-grade equivalent lines on these services are presubscribed to the ILEC for intraLATA toll service?

2. How many Unbundled Network Elements ("UNEs") are you purchasing in New Jersey from an ILEC? If exact figures are not known, provide estimates.
   B. By UNE (loop, switching, interoffice transport, directory assistance, etc.);
   C. By ILEC density cell;
   D. By county, municipality or ZipCode;
   E. Business vs. Residence.

3. How many New Jersey customer accounts is your firm or any affiliate serving directly, *i.e.*, by means of loop or other equivalent facilities not provided wholly by an ILEC (using resale or a UNE)? If exact figures for this answer or for the sub-parts below are not known, provide estimates.
   C. How many different customer service addresses does this represent?
   D. How many different enterprises (*i.e.*, corporations, government entities, partnerships, proprietorships, etc.) does this represent?
   E. Categorize the above customer accounts by the number of total equivalent voice-grade lines that serve the customer service address (1 line, 2-5 lines, 6-15 lines, 16 lines and above). Include description and example of methodology used to determine equivalent lines.
   F. Categorize the above customer accounts by the average monthly revenue derived from the account for all telecommunications services provided in whole or in part over the non-ILEC facilities (under $40, $40-$100, $100-$500, $500-$2000, over $2000).
   G. Categorize the above customer accounts by the average monthly voice-grade equivalent minutes of use carried by the non-ILEC facilities to and from the customer service address (0-1000; 1001-10,000; 10,001 to 100,000; and above 100,000).
   H. For each of the equivalent voice-grade line size groupings in C, categorize each of the customer accounts by the type of facility used to reach the customer service address (*e.g.*, 2-wire copper, 4-wire copper, DS1, DS3, SONET ring, etc.). If the means of reaching the customer service address is a proprietary service, identify the service name.
   I. For the above customer accounts, identify every type of telecommunications services your firm or any affiliate provides: interLATA/interstate or international, interLATA/intrastate toll, intraLATA toll, local, internet access, cable TV or other entertainment services.

J. For the above customer accounts, identify the number of accounts where either local or tandem switching is provided by an ILEC, by your firm or an affiliate, or by some other firm.

K. For each of the categories of customer accounts in C, above, served directly by your firm or an affiliate, identify whether some loops are also provided by the ILEC to serve the customer service address and, if so, what percentage of the total loops (by voice grade equivalent) to the address are provided by the ILEC.

4. How many New Jersey customer accounts is your firm or any affiliate serving by means of private line or Special Access facilities provided in whole or in part by an ILEC and used to carry some local traffic? If exact figures for this answer or for the sub-parts below are not known, provide estimates.

D. How many different customer service addresses does this represent?

E. How many different enterprises (*i.e.*, corporations, government entities, partnerships, proprietorships, etc.) does this represent?

F. Categorize the above customer accounts by the number of total equivalent voice-grade lines that serve the customer service address (1 line, 2-5 lines, 6-15 lines, 16 lines and above).

G. Categorize the above customer accounts by the average monthly revenue derived from the account for all telecommunications services provided in whole or in part over the non-ILEC facilities (under $40, $40-$100, $100-$500, $500-$2000, over $2000).

H. Categorize the above customer accounts by the average monthly voice-grade equivalent minutes of use carried by the private line or Special Access facilities to and from the customer service address (0-1000; 1001-10,000; 10,001 to 100,000; and above 100,000). Identify for each category what proportion of the traffic is "local" as that term is defined in the corresponding ILEC tariffs.

I. For each of the equivalent voice-grade line size groupings in C, categorize each of the customer accounts by the type of facility used to reach the customer service address (*e.g.*, 2-wire copper, 4-wire copper, DS1, DS3, SONET ring, etc.). If the means of reaching the customer service address is a proprietary service, identify the service name and the provider of the proprietary service.

J. For the above customer accounts, identify every type of telecommunications service your firm or any affiliate provides: interLATA/interstate or international, interLATA/intrastate toll, intraLATA toll, local, internet access, cable TV or other entertainment services.

K. For the above customer accounts, identify the number of accounts where either local or tandem switching is provided by an ILEC, by your firm or an affiliate, or by some other firm.

L. For each of the customer account categories in C, above, served by your firm or an affiliate by means of ILEC private line or Special Access facilities, identify whether some other loops are also provided by the ILEC to serve the customer service address and, if so, what percentage of the total loops (by voice grade equivalent) provided to the address are provided by the ILEC.

5. Are there any marketing or sales guidelines, instructions, training materials, etc. used by your firm or any affiliate that identify the customer type, line size, revenue potential, traffic potential or other customer features where a non-ILEC facility could be made available to serve that customer? Please provide a copy of any such materials that have been reduced to writing.

6. Identify the percentage of customer service addresses in New Jersey that are passed by existing or planned facilities owned or controlled by your firm or any affiliate. How many equivalent voice grade lines are represented by these customer service addresses? Categorize the customer service addresses passed by density cell and by business/residence classification. If exact figures are not known, provide estimates.

7. Identify separately the percentage of customer service addresses in New Jersey that are passed by the facilities of any cable company with which your firm has a contract, agreement or other arrangement (whether executory or announced pending execution) that would permit your firm or any affiliate to provide any telecommunications service, in whole or in part, over those cable facilities. How many equivalent voice grade lines are represented by these customer service addresses? Categorize the customer service addresses passed by density cell and by business/residence classification. If exact figures are not known, provide estimates.

8. Identify by density cell and by business/residence classification the percentage of New Jersey customer service addresses that are technically capable of being served (*i.e.*, within technical range) by existing or planned local or tandem switches owned or operated by your firm or any affiliate. For those customer service addresses that can not be served by such switches, please identify the technical limitations that pertain. If exact figures are not known, provide estimates.

SWB
February 15, 1999

PROJECT NO. 16251

INVESTIGATION OF	§	
SOUTHWESTERN BELL TELEPHONE	§	PUBLIC UTILITY COMMISSION
COMPANY'S ENTRY INTO THE	§	
INTERLATA TELECOMMUNICATIONS	§	OF TEXAS
MARKET	§	

SWBT'S RESPONSE TO QUESTIONS REGARDING THE EFFECT OF THE SUPREME COURT'S DECISION IN AT&T CORP. v. IOWA UTILITIES BOARD

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PROJECT NO. 16251

INVESTIGATION OF SOUTHWESTERN BELL TELEPHONE COMPANY'S ENTRY INTO THE INTERLATA TELECOMMUNICATIONS MARKET	§ § § § §	PUBLIC UTILITY COMMISSION OF TEXAS

SWBT'S RESPONSE TO QUESTIONS REGARDING THE EFFECT OF THE SUPREME COURT'S DECISION IN AT&T CORP. v. IOWA UTILITIES BOARD

The Supreme Court has clarified the ground rules for local competition under the Telecommunications Act of 1996 (the "1996 Act" or "Act"). Although additional issues may arise with ongoing implementation of the Act, the framework for local competition in Texas is in place and this Commission and the FCC can now take the final steps toward full interLATA competition. Together with this Commission's decisions and SWBT's voluntarily negotiated agreements, the holdings of AT&T Corp. v. Iowa Utilities Board, 67 U.S.L.W. 4104 (U.S. Jan. 25, 1999 (Nos. 97-826 et al.)), provide a solid foundation for approval of SWBT's application for relief under section 271. Nothing in the decision should delay the Commission from crossing the section 271 finish line it recently noted is within sight.

SWBT recognizes that the law governing local competition in Texas will never be static. Accordingly, SWBT will continue to negotiate in good faith to resolve issues regarding interconnection and network access as they arise. Furthermore, as described in this Response, SWBT has committed to abide by existing agreements containing terms and conditions previously approved by this Commission as conforming to the requirements of the 1996 Act and Texas law. SWBT has made this voluntary commitment notwithstanding rulings from the Supreme Court suggesting that SWBT's wholesale offerings may be more generous than are required under the Act. SWBT thus is doing everything reasonably possible to ensure its satisfaction of all future requirements that may be articulated by the FCC or the courts. Just as important,

SWBT is providing assurance to this Commission and its CLEC customers that SWBT intends to finish successfully the work of the collaborative process.

BACKGROUND

I. THE SUPREME COURT'S DECISION

In a majority opinion by Justice Scalia, the Supreme Court addressed three broad aspects of the Eighth Circuit's decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997). First, the Supreme Court reviewed the Eighth Circuit's holding that the states, not the FCC, generally have jurisdiction over the prices and terms of intrastate facilities and services made available pursuant to the 1996 Act. See id. at 793-805. Second, the Court considered FCC rules that established terms and conditions under which incumbent LECs must make pieces of their networks available to new entrants. See id. at 807-18. Finally, the Court considered the legality of the FCC's "pick and choose" rule, which the Eighth Circuit had struck down as inconsistent with the Act's preference for voluntary negotiations between carriers. Id. at 800-01. We discuss these separate aspects of the Supreme Court's decision below.

A. Jurisdictional Issues

Like the Eighth Circuit, the Supreme Court considered jurisdictional issues principally in the context of pricing. Unlike the court of appeals, however, the Supreme Court found that the FCC has jurisdiction under 47 U.S.C. § 201(b) to promulgate rules to guide state decisions on the pricing of unbundled network elements ("UNEs") and resold services. Slip op. at 9-17; see generally 47 C.F.R. §§ 51.501-51.515, 51.601-51.611, 51.701-51.717; see also 120 F.3d at 800 n.21 (excluding some provisions of FCC pricing rules from court's jurisdictional decision). Importantly, the Supreme Court did not hold that the FCC's TELRIC, geographic deaveraging, and resale pricing rules are substantively valid. The Eighth Circuit had not yet ruled on that issue, see 120 F.3d at 800, and, as Justice Breyer pointed out in his dissent, the permissibility of the FCC's pricing approach was not before the Court. See slip op. at 17 (Breyer, J., concurring in part and dissenting in part). The issue whether the FCC's pricing rules are consistent

with the 1996 Act and otherwise lawful will be addressed following formal transmittal of the Supreme Court's judgment to the Eighth Circuit. See Sup. Ct. R. 45.3 ("[A] formal mandate does not issue unless specifically directed; instead, the Clerk of this Court will send the clerk of the lower court a copy of the opinion or order of this Court and a certified copy of the judgment.").

The Supreme Court also affirmed FCC jurisdiction to issue other rules that the Eighth Circuit had struck down. These rules address state review of interconnection agreements that predate the 1996 Act, 47 C.F.R. § 51.303; exemptions to section 251's requirements for certain rural carriers, id. § 51.405; and intrastate dialing parity, id. §§ 51.205-215. See slip op. at 17. Again, future decisions will determine when, and how, the Supreme Court's orders on these issues will be given effect.

B. UNEs

The Supreme Court addressed a series of related issues regarding the terms under which incumbent LECs must unbundle their local networks for new entrants.[1] The Court agreed with the FCC that there is no absolute prohibition on defining UNEs to include items that are not part of the physical facilities and equipment used to provide local telephone service. Slip op. at 19-20. The Court made clear, however, that it was not approving the FCC's holdings that incumbent LECs must make particular UNEs available. Rather, the Court found that the FCC essentially ignored Congress's dictate to take into account whether (1) "access to such network elements as are proprietary in nature is necessary;" and (2) "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2); see slip op. at 20-25. Accordingly, the Court vacated the FCC rule (47 C.F.R. § 51.319) that established the following mandatory UNEs: the local loop, the network interface device, switching,

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[1] The Supreme Court was not asked to – and did not – reconsider the Eighth Circuit's invalidation of several FCC rules concerning access to UNEs. The invalid rules include the FCC's requirement that incumbent LECs provide interconnection and UNEs of superior quality to what the incumbent itself uses (47 C.F.R. §§ 51.305(a)(4), 51.311(c)); the FCC's requirement that incumbent LECs combine UNEs in any technically feasible manner (47 C.F.R. § 51.315(c)); and the FCC's requirement that incumbent LECs combine their UNEs with the CLEC's own elements (47 C.F.R. § 51.315(d)). See 120 F.3d at 812-18 & n.38. Consequently, these rules remain vacated and unenforceable.

interoffice transport, signaling and call-related databases, OSS, operator services, and directory assistance. On remand, the FCC will determine the status of these UNEs. The FCC also might promulgate new rules for determining whether other network elements must be made available pursuant to section 251(c)(3).

The Court next turned to issues surrounding the so-called "UNE platform." It agreed with the FCC that CLECs need not own a piece of a network to obtain UNEs, and also that incumbents must, upon a CLEC's request, leave already-combined network elements physically assembled. Slip op. at 25-28. The Court observed, however, that debates about the availability of the UNE platform "may be largely academic" because – due to the invalidity of FCC Rule 51.319 – new entrants may no longer have a right to receive all the UNEs that make up incumbents' finished services. Slip op. at 25, 26.

C. Pick and Choose

Finally, the Supreme Court reversed the Eighth Circuit and upheld the FCC's "pick and choose rule," which implemented 47 U.S.C. § 252(i). See slip op. at 28-29. Under this rule, an incumbent LEC must "make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission," on the same terms as are provided in the approved agreement. 47 C.F.R. § 51.809(a).

D. Separate Opinions

Three Justices wrote separate opinions. Justice Souter disagreed with the majority's rejection of the FCC's guidelines for determining what UNEs must be provided to CLECs. Justice Thomas (joined by Chief Justice Rehnquist and Justice Breyer), dissented from the Court's jurisdictional findings, on the basis that "the majority takes the Act too far in transferring the States' regulatory authority wholesale to the Federal Communications Commission." Slip op. at 2 (Thomas, J., concurring in part and dissenting in part). Justice Breyer wrote a separate opinion not only faulting the majority's jurisdictional analysis, but also expressing skepticism that the 1996 Act

compels use of a TELRIC-like, forward-looking pricing methodology. See slip op. at 13-17 (Breyer, J., concurring in part and dissenting in part). Justice Breyer did agree with the majority's invalidation of Rule 51.319, noting that the FCC's sweeping unbundling requirements threatened to stifle competition. He explained:

> Rules that force firms to share every resource or element of a business would create, not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms. . . . Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may make the game not worth the candle.

Id. at 19-20 (emphasis in original).

II. THE DECISION'S IMPACT ON SWBT'S INTERLATA ENTRY

The Supreme Court's decision does not affect SWBT's commitment to open local markets. Nor does it provide any basis for slowing this Commission's progress toward authorizing full interLATA competition in Texas.

By invalidating Rule 51.319, the Supreme Court eliminated the legal requirement that SWBT provide the mandatory UNEs listed by the FCC. The Court's decision calls into question state orders mandating the provision of additional UNEs, where the statute's "necessary" and "impair" standards were not fully applied. As explained below, however, SWBT is prepared to continue operating under the interconnection, resale, and UNE requirements previously set by this Commission unless the parties mutually agree to alternative terms or alternative terms are approved in accordance with the normal regulatory and judicial processes. All items required under the competitive checklist (including access to local loops, switching, transport, directory assistance, operator services, signaling, and call-related databases) thus remain available to SWBT's CLEC customers in Texas. SWBT likewise is continuing to make available other UNEs not specified in Rule 51.319, in accordance with SWBT's Texas interconnection agreements.[2]

[2] SWBT, like other parties, has not and does not forfeit its right to pursue timely appeals of

The effect of these commitments is straightforward: the Supreme Court's decision will have no current impact on any CLEC's ability to obtain particular network elements from SWBT under existing agreements. To the extent contracts may be modified in the future, that will be done in accordance with the negotiation or regulatory and judicial processes.

RESPONSES TO THE COMMISSION'S QUESTIONS

SWBT has done its best to answer the questions presented by the Commission. SWBT's responses, however, are based on legal rulings that have only recently been rendered and factual information that is not yet complete. SWBT accordingly is unable to answer fully some of the Commission's questions at this time and must reserve the right to alter or modify positions based upon future circumstances and new information.

I. Pricing

Whether SWBT intends to seek a change in the rates established by this Commission or agreed to by the parties for any of the agreements upon which SWBT relies in seeking Section 271 relief.

SWBT has no current plans to seek to modify the prices in its voluntarily negotiated interconnection agreements. SWBT will abide by the prices set by this Commission in arbitration proceedings or agreed to by the parties until SWBT is authorized to modify those rates to alternate rates that are deemed, under regulatory and judicial processes, to comply with the Act and governing FCC and/or Commission rules.

Whether SWBT intends to assert that the rates set by this Commission for any of the agreements upon which SWBT relies in seeking Section 271 relief were not set according to TELRIC. If so, please explain the legal basis upon which SWBT relies.

The prices for interconnection and UNEs set by the Commission in arbitration proceedings, and subsequently incorporated directly or indirectly through "MFNing" into arbitrated agreements, were based on cost studies that the Commission deemed to

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arbitrated agreements under section 252, nor is SWBT limiting the range of claims it is bringing or may bring with respect to arbitrated agreements that are subject to judicial review.

comport with the FCC's and this Commission's TELRIC requirements. See Project No. 16251, SWBT's Moore Aff. ¶¶ 7-51 (filed Mar. 2, 1998). Indeed, this Commission noted in Phase I of the Mega Arbitration that its TELRIC methodology was similar to the FCC's approach. Arbitration Award, Petition of MFS Communications Co., Inc. for Arbitration of Pricing of Unbundled Loops, Docket No. 16189, at 25-31 (Nov. 7, 1996); see also Brief of the Texas PUC, Southwestern Bell Tel. Co. v. AT&T Communications, No. A-98-CA-197 SS, at 19 (W.D. Tex. filed Aug. 24, 1998) (stating that the Commission "set permanent rates based on revised TELRIC cost studies"). Even though SWBT believes the prices in its arbitrated agreements are more generous to SWBT's wholesale customers than the Act requires, SWBT will (as stated above) abide by these prices until such time as new prices are adopted through negotiation or by regulatory or judicial order.

Please also discuss whether the current non-geographically deaveraged loop prices and the rates for reciprocal compensation must be changed to comply with the FCC's pricing rules.

This Commission approved averaged loop prices that it found consistent with the requirements of the Act. With regard to FCC rules, it would be premature to implement the Commission's geographically deaveraged prices based on speculation about the final FCC pricing rules that ultimately will result from the Supreme Court's decision.

Like SWBT's interim and UNE prices, the reciprocal compensation rates in SWBT's arbitrated agreements are based on TELRIC and thus do not appear to require any revisions. It should be noted, however, that the scope of a BOC's reciprocal compensation obligation – particularly with respect to Internet traffic – is currently the subject of judicial and regulatory proceedings.

II. Access to UNEs

A. Whether SWBT intends to continue to provide Unbundled Network Elements (UNEs) pursuant to pending (signed and filed) and approved interconnection agreements, including those agreements upon which SWBT relies in seeking Section 271 relief. If so, for what period of time? If SWBT intends not to provide one or more UNEs, please list and explain the legal basis. Please explain SWBT's intent

with regard to the UNEs provided during any period of contract renegotiation and under the terms of the contract.

On February 9, 1999, SBC Communications Inc. informed the FCC of its intentions regarding the provision of UNEs following the Supreme Court's decision. A copy of that letter is attached hereto as Exhibit A. As set forth in the letter, SWBT (an SBC subsidiary) will continue to provide UNEs in accordance with its existing local interconnection agreements until the parties mutually agree to alternative provisions or until alternative provisions are approved through the regulatory and judicial processes.

B. State whether a competitive local exchange company (CLEC) is legally required to demonstrate a "necessity and impaired ability" in order to gain access to one or more UNEs approved by the Commission pursuant to Section 251(d)(2).

As discussed above, SWBT intends to provide the UNEs set forth in its existing local interconnection agreements until the parties mutually agree to alternative contractual provisions or until alternative provisions are approved for inclusion in the agreement through the regulatory and judicial processes. SWBT also will continue to negotiate in good faith with any party seeking to enter into a new local interconnection agreement.

The FCC has not yet had the opportunity to reformulate its rules to comply with the standards of section 251(d)(2). Pending the FCC's promulgation of such rules and the approval of those rules through the judicial process if necessary, the extent to which CLECs will be required to demonstrate a "necessity and impaired ability" in order to gain access to UNEs is unsettled. At a minimum, before the FCC can construct a new list of UNEs to which CLECs may obtain access, it must consider with respect to each network element whether (1) the element is available from sources outside incumbent LECs' networks, and (2) lack of access to the element would increase competitors' costs or decrease the quality of their service sufficiently to "impair" their ability to provide the service in question. See Iowa Utils. Bd., slip op. at 20-25.

If the answer [to Question B] is yes:

1. Set forth the specific UNEs.

Pending the approval of provisions replacing 47 C.F.R. § 51.319 through the regulatory and judicial processes, SWBT will continue to provide the UNEs that the FCC and this Commission have ordered it to provide, and will comply with its current UNE contractual obligations.

2. Discuss whether the requirement applies equally to CLECs that have an approved interconnection agreement and to CLECs that have not entered into an interconnection agreement with SWBT.

New entrants can obtain the same UNEs that are available to CLECs that have approved interconnection agreements with SWBT through the MFN process. SWBT also will negotiate in good faith with new entrants interested in UNEs that are not available through existing agreements.

3. Discuss how SWBT believes the FCC and PUC should interpret and apply the terms "necessary," "impair," and "proprietary" used in Section 251(d)(2), including any procedural processes and time frames that should apply.

The Supreme Court's decision makes clear that before the FCC can construct a new list of network elements that must be provided on an unbundled basis, it must carefully consider as part of its section 251(d)(2) inquiry with respect to each network element (1) whether the element is available from sources outside the incumbents' networks, and (2) whether lack of access to the element would increase competitors' costs or decrease the quality of their service sufficiently to "impair" their ability to provide the service in question.

SWBT will more fully develop its positions regarding the proper interpretation of the terms "necessary," "impair," and "proprietary," as well as its procedural positions, in the remand proceedings to be conducted by the FCC.

4. Set forth all of the network elements SWBT considers to be "proprietary," including OSS and other databases.

As just stated, SWBT has not yet fully developed its position regarding how the term "proprietary," as used in section 251(d)(2), should be interpreted. Nor has the FCC ruled on this issue in the wake of the Supreme Court's decision. At this time,

therefore, SWBT is unable to state for the record which elements it considers "proprietary."

5. Discuss the policy SWBT will follow in the interim before the FCC has implemented a revised Rule 319.

As set forth in SBC's February 9, 1999 letter to the FCC, SWBT intends to continue to provide UNEs in accordance with its existing local interconnection agreements until the parties mutually agree to alternative provisions or until alternative provisions are approved through the regulatory and judicial processes. In the event that other parties to existing interconnection agreements attempt to invalidate these agreements, however, SWBT reserves the right to respond as appropriate. New entrants can obtain the same UNEs that are available to CLECs that have approved interconnection agreements with SWBT through the MFN process. SWBT also will negotiate in good faith with new entrants interested in UNEs that are not available through existing agreements. In addition, SWBT will consider in good faith any requests for new UNEs, pursuant to the special request and other provisions of existing agreements.

6. Discuss whether SWBT believes that the "necessary and impair" standard requires or supports placing limitations on the availability of UNEs by carrier, customer class, geography, or duration.

At this early point in its examination of the issue, prior to the FCC's proceedings, SWBT believes that application of the "necessary and impair" standard may depend upon a variety of factors. These might include (but are not limited to) the geographic location of the UNE, the characteristics of the customer the CLEC intends to serve with the UNE, the duration of the requested use of the UNE, and the availability of alternatives from SWBT and/or other providers. Consideration of these and other potentially relevant factors likely will occur before the FCC in the first instance.

C. Explain whether and the extent to which the Supreme Court decision affects the Commission's establishment of the extended link as a stand alone UNE.

SWBT does not believe that FCC rules require SWBT to combine unbundled loop elements and unbundled transport elements that are not currently combined in SWBT's network. SWBT has not entered into any voluntarily negotiated agreements that contain such a requirement, nor has SWBT been ordered to combine these elements in arbitration proceedings under sections 251 and 252. To the extent this issue may be considered in connection with the Commission's public interest examination under section 271, however, SWBT notes that its provision of special access, which is reasonably interchangeable with extended links, may be relevant. In many SWBT service areas, there also may be other alternatives that are reasonably interchangeable with SWBT's loop and transport elements.[3]

III. Bundling of UNEs

A. State whether a CLEC that is negotiating with SWBT now or in the immediately foreseeable future on interconnection terms and conditions will be able to order the combination of network elements necessary to provide a finished retail service (typically referred to as the UNE platform or UNE-P) to local service customers, state the rate that would apply, and explain the legal basis for your response.

SWBT is prepared to preserve the status quo with respect to provisioning end-to-end service at UNE rates under existing agreements, even though the Supreme Court expressly cast doubt upon whether the UNE platform concept retains any viability after Iowa Utilities Board. See slip op. at 25, 26. Certain SWBT contracts provide CLECs access to combinations of UNEs where the CLEC orders the UNEs with sufficient specificity for SWBT to be able to provide the UNEs in the manner requested by the CLEC. E.g., AT&T Agreement Attach. 6 § 2.4.1. The applicable terms and conditions are set forth in those contracts. These terms and conditions, including prices and

[3] In light of the Supreme Court's decision to vacate the FCC rule that established certain mandatory UNEs (47 C.F.R. § 51.319), the FCC's obligation on remand to determine the status of these UNEs, and FCC Chairman Kennard's recent statement that his Commission intends to conclude its proceeding on remand this summer, this Commission should await the FCC's decision before making any determinations regarding the availability of particular potential UNEs.

ordering with specificity, will continue to apply until the parties mutually agree to alternate terms or alternate terms are approved through the standard regulatory and judicial processes. As elsewhere discussed, SWBT offers terms from its existing contracts to other CLECs in accordance with the Act and the Supreme Court's recent decision.

B. State the process a CLEC operating under an approved interconnection agreement will need to follow to order the combination of network elements necessary to provide a finished retail service (typically referred to as the UNE platform or UNE-P) to local service customers and explain the legal basis for your response.

Nothing in the Supreme Court's decision affects the requirement that CLECs order in accordance with the terms of their contracts. Thus, the contractual terms and conditions will continue to apply when CLECs order a combination of elements for use in providing a finished retail service. Those terms and conditions will continue to apply until the parties mutually agree to alternate terms or alternate terms are approved through the standard regulatory and judicial processes. See also SWBT's response to Question III.C.

C. State whether SWBT will require a CLEC that orders a combination of previously combined network elements to pay a "glue charge," discuss which charges (recurring and nonrecurring) are included as part of the "glue charge," and explain the legal basis for your response.

The same charges related to UNE combinations that are set out in SWBT's contracts will continue to apply until the parties mutually agree to alternate terms or alternate terms are approved through the standard regulatory and judicial processes. Certain contracts provide that the central office access charge ("COAC") would not be applied to any UNE or resale order if the Supreme Court vacated the Eighth Circuit's holding regarding an incumbent LEC's authority to separate already combined UNEs. SWBT will comply with those contracts in accordance with the commitments set forth above with respect to SWBT's continuing provision of UNEs. SWBT nevertheless believes the UNE prices may not adequately compensate SWBT for its cost. SWBT

therefore reserves the right to seek appropriate cost recovery in negotiations and any required regulatory or judicial proceedings.

Nothing in the Supreme Court's opinion requires SWBT to combine UNEs that presently are not assembled in SWBT's network. To the extent SWBT may perform such work, therefore, SWBT should be compensated at competitive levels.

D. State whether SWBT will bundle UNEs that are not already connected at the time of request for a CLEC, indicate what the rate will be for such combining, and explain the legal basis for your response.

As explained in response to Question III.A. and throughout this Response, SWBT is abiding by the terms of those contracts in Texas which at the present time have been deemed to require SWBT to combine UNEs until the parties mutually agree to alternative terms or until alternative terms are approved through the standard regulatory and judicial processes. See also SWBT's response to Question III.C.

E. Explain whether and the extent to which the Supreme Court decision affects a facilities-based CLEC that combines a SWBT UNE with one or more of its own UNEs, including the legal basis for your response.

As explained above, the Supreme Court's decision does not affect the Eighth Circuit's prior holding that incumbent LECs are not required to combine their UNEs with CLECs' network facilities. Also as described above, the Supreme Court's invalidation of FCC Rule 51.319 ultimately may affect the range of UNEs to which CLECs will have access.

F. Explain whether and the extent to which SWBT believes it has the legal ability to separate UNEs that are combined.

Under the Supreme Court's decision, FCC Rule 51.315(b) will govern requests for access to currently assembled facilities that must be made available as UNEs under sections 251(c)(3) and 251(d)(2). That rule provides: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). Despite this specific requirement, however, SWBT retains a general right to control its own network and to utilize and

engineer that network as necessary for efficient provision of services to SWBT's wholesale and retail customers.[4]

Certain SWBT contracts currently require SWBT to provide UNEs on a combined basis. SWBT will honor those contractual obligations, as stated above, and will abide by Rule 51.315(b).

IV. MFN/PICK AND CHOOSE

A. Discuss how SWBT will implement the Supreme Court's ruling on pick and choose, including the legal basis upon which SWBT relies:

1. The extent to which SWBT will allow a CLEC to adopt specific provisions and sections from approved interconnection agreements without having to adopt the entire agreement;

CLECs may adopt the entire approved interconnection agreement of another carrier, but CLECs are not obligated to accept the entire agreement in order to obtain a portion of it. SWBT will provide interested CLECs with individual interconnection, service, or network element arrangement, provided that the CLEC also accepts all legitimately related terms and conditions. As a practical matter, a particular interconnection, service, or network element arrangement and most of its related terms and conditions are typically located together in the same section, appendix, or attachment of an interconnection agreement. In such a case, the CLEC will adopt the entire section, appendix, or attachment, along with any additional related terms. SWBT therefore believes that the "section-by-section" approach set out in many of its approved agreements is consistent with the requirements of section 252(i) and the FCC's pick and choose rule. See, e.g., MCI Agreement § 19; AT&T Agreement § 31; Time Warner Agreement Art. XX.

In the event a CLEC that has a Texas PUC-approved interconnection agreement with SWBT requests a divisible portion of another CLEC's approved agreement, SWBT and the CLEC would create and sign a contract amendment that would be filed with the

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[4] Cf. U S West Communications Inc. v. AT&T Communications of the Pac. N.W., Inc., Civil No. 97-1575-JE, 1998 U.S. Dist. LEXIS 20076, at *48 (D. Ore. Dec. 9, 1998) ("U S West is not a division of AT&T. . . . U S West ordinarily has no obligation under the Act to modify its network to comply with AT&T standards and procedures except as described above.").

Commission for its approval. This amendment would be patterned after the CLEC's own agreement, but the applicable provisions that the CLEC wishes to adopt would replace the corresponding provisions in the CLEC's own agreement.

2. The extent to which a CLEC will have the ability to choose previously approved terms and conditions in combination with its own additional, unique provisions;

A CLEC may adopt from an approved agreement any individual interconnection, service, or network element arrangement and its related terms and conditions, and combine them with other negotiated or arbitrated provisions. But where a carrier with an existing agreement exercises this right, such an arrangement can be adopted without negotiation only if the "MFNed" terms do not modify and are not modified by remaining terms of that carrier's existing agreement. In addition, any requested modifications to the "MFNed" language would in effect be a request for new negotiations. A CLEC's request for modified language would be subject to negotiation and mediation or arbitration if necessary, and would enable SWBT to seek its own modifications to language in the reopened contract.

3. The extent to which restriction(s) on the use of UNEs and interconnection facilities in an approved interconnection agreement will apply to a CLEC that MFNs into the agreement or a portion thereof;

If a CLEC desires to opt into an interconnection, service, or network element arrangement of an approved interconnection agreement, the CLEC must take all the related "rates, terms, and conditions" of the arrangement, along with any definitive interpretations of those provisions. 47 C.F.R. § 51.809; see generally First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 16137-39, ¶¶ 1310-1315 (1996) (requesting carriers must take all provisions relating to requested items). For example, a CLEC interested in adopting resale terms from an approved interconnection agreement must accept all associated terms and conditions, such as those for the ordering and provisioning, maintenance, and billing of the resold service(s) made available under the approved agreement.

4. The effect on the term of an interconnection agreement when the agreement is formed by "picking and choosing" terms from various agreements that have different expiration dates;

An interconnection agreement that does not have a single expiration date would impose serious administrative burdens on CLECs as well as SWBT, and might be unworkable in practice. Thus, SWBT will negotiate – as it does today – a single expiration date for any interconnection agreement that incorporates sections from multiple agreements with different expiration dates. In the event that SWBT and the CLEC cannot arrive at a mutually agreeable expiration date, the expiration date of the new agreement should be the earliest expiration date found in any of the agreements from which the adopted sections were drawn. This date is the appropriate one because, in this situation, SWBT would not have agreed with any carrier, nor been ordered by this Commission, to abide by each term in the new contract beyond that earliest expiration date.

5. The effect the Supreme Court's decision has, if any, on the "section by section" MFN provisions contained in current interconnection agreements;

SWBT has not reviewed the MFN provisions of every approved agreement for consistency with the Supreme Court's decision. However, as explained in response to Question IV.A.1., the MFN provisions in SWBT's contracts are generally consistent with the holding of Iowa Utilities Board.

6. The extent to which a CLEC can "adopt" performance measures and damage provisions from an approved interconnection agreement;

A CLEC may adopt performance measures and damages provisions from an approved interconnection agreement, provided that the CLEC concurrently adopts the terms and conditions governing any facilities or services that are legitimately related to those performance measures and damages provisions.

7. **The extent to which SWBT will reopen an approved interconnection agreement to renegotiation of if a CLEC attempts to take advantage of its right to pick and choose;**

SWBT does not intend to reopen an approved interconnection agreement if a CLEC wishes to adopt, without modification, legitimately related provisions of another interconnection agreement. However, as explained in response to Question IV.A.2, SWBT does not believe a CLEC can opt into an interconnection, service, or network element arrangement of an approved interconnection agreement while also seeking revisions to the rates, terms, and conditions that are legitimately related to that arrangement.

B. **State whether SWBT believes any of its outstanding interconnection agreements are no longer subject to MFN because they have been in effect longer than a "reasonable period of time" as stated in FCC rule 809, and discuss how SWBT interprets the term "reasonable period of time," including the legal basis for that interpretation.**

The "reasonable period of time" provision of FCC Rule 51.809 has yet to be applied or interpreted. Yet there are some agreements, including those that have expired, that certainly should not be available to other CLECs under this provision. As the Commission has recognized, CLECs cannot have a right to "perpetual renewal," of the terms of interconnection agreements, in part because "certain terms . . . may need renegotiation." Brief of the Texas PUC, Southwestern Bell Tel. Co. v. AT&T Communications, No. A-98-CA-197 SS, at 46-47 (W.D. Tex. filed Aug. 24, 1998); accord Order at 6, Southwestern Bell Tel. Co. v. AT&T Communications (Nov. 9, 1998) (holding that "MCI should not be granted a perpetual unilateral option to renew").

C. **State whether SWBT believes that one or more of the UNEs it currently provides would be more costly to provide to a particular class of carriers. If so, please discuss the legal basis for SWBT's belief.**

SWBT has not undertaken cost studies analyzing the cost of providing UNEs to particular classes of carriers. Therefore, SWBT has insufficient information to answer this question at the present time.

CONCLUSION

In light of the commitments outlined above, this Commission can and should proceed quickly to a favorable recommendation on SWBT's proposed section 271 application. As the back-and-forth of the various Iowa Utilities Board decisions shows, it simply would not be fruitful to guess at what rules ultimately will emerge after remand from the Supreme Court. In any event, new local carriers and Texas consumers are protected, in the near term, by SWBT's commitment to operate in accordance with existing agreements and, in the long term, by the ongoing powers of this Commission, the FCC, and the courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Melanie S. Fannin, Vice President and General Counsel-External Affairs Texas for Southwestern Bell Telephone Company certify that a true and correct of this document was been served on all parties of record in this proceeding on February 15, 1999 in the following manner: via facsimile and/or e-mail.